# EXHIBIT D

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| **IN RE: VALSARTAN PRODUCTS LIABILITY LITIGATION** | **CIVIL ACTION NUMBER: 19-md-02875** |
| | **TELEPHONIC STATUS CONFERENCE** |

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
October 27, 2022
Commencing at 10:00 a.m.

**B E F O R E:** **THE HONORABLE ROBERT B. KUGLER**
**UNITED STATES DISTRICT JUDGE**
**and**
**THOMAS I. VANASKIE (RET.)**
**SPECIAL MASTER**

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(PROCEEDINGS held telephonically before The Honorable ROBERT B. KUGLER and SPECIAL MASTER [!SPECIAL MASTER] at 10:00 a.m.)

SPECIAL MASTER VANASKIE: Hello.

RESPONSE: Good morning.

SPECIAL MASTER VANASKIE: We'll give it a couple more minutes because people are still joining, but it is 10:00.

(Pause in proceedings.)

SPECIAL MASTER VANASKIE: Maybe we'll get started now.

Do we have a court reporter?

COURT REPORTER: It's Ann Marie Mitchell, Your Honor. Good morning.

SPECIAL MASTER VANASKIE: Hi, Ann Marie. Nice to have you. I hope all is well.

I wanted to clarify at the outset what it is you want me to address before we bring in Judge Kugler.

I know I have this TPP trial defendants motion to compel discovery.

Also asserted in the brief is a request to set a schedule with respect to damage expert reports, Daubert motions, et cetera.

It seems to me that part of this motion that's before me is for Judge Kugler.

Who's the spokesperson for the plaintiffs, and what

is your position?

MR. HONIK: Your Honor, good morning, this is Ruben Honik.

Your Honor, we were advised of the defendants' interest and proposed schedule, I think it was either the day of or the day before we submitted these letters or agenda to the Court.

And our position is that it's appropriate to arrive at a schedule. And it's certainly been our understanding on the plaintiffs' side that we would tackle that, as we have all other scheduling matters, which is to say that we would meet and confer, and to the extent the parties could agree upon a schedule, we would jointly propose that to the Court.

And it is still our intention to do that, contrary to what the submitted letter by the defendants to Your Honor for today indicates. We'd like the opportunity to confer with them. We think a schedule should be arrived at. If we can do that, all the better. If we can't, we'll certainly submit it to the Court. And I believe you're correct that that's a matter for Judge Kugler.

So we have a deadline between, I suppose, now and the next -- we have an audience with the Judge.

SPECIAL MASTER VANASKIE: All right. Who is the spokesperson for the defense?

MR. OSTFELD: Your Honor, this is Greg Ostfeld. I'll

be the spokesperson for the defense on this issue.

Respectfully, Your Honor, we have raised this issue at five separate meet and confers. We raised it on October 9th, October 12th, October 16th, October 18th and October 25th. And on each occasion we have asked plaintiffs to identify their proposed schedule for damages expert deadlines.

And the first three times they demurred on that requested. To the fourth time on October 18th, we were told that their position was no deadlines should be set until there's been a ruling on class certification, a position with which we vigorously disagree because we feel the Court has made clear that a TPP trial is on a separate track from class certification. So we believed we were at an impasse.

We had previously discussed any number of ranges that would be acceptable to the defendants, ranging from 30 to 60 days after the CMO 29 deadlines, when plaintiffs advised us that their position was they were not willing to discuss setting case management deadlines for damages experts until there was a class certification ruling.

We said we planned to raise this in our brief with the Court. They requested our schedule, our specific schedule that we would propose, which we also provided, and invited further meet and confer. And there still hasn't been a meet and confer.

Our view is if their position is there should be no

deadlines until there's been a class certification ruling, we are at an impasse, and this issue is ripe for determination. And I would defer to Your Honor as to whether this is an issue for Your Honor or for Judge Kugler.

If their position is no longer that this needs to await a class certification ruling, we are happy to discuss plaintiffs' schedule. But we feel that that position, if it's going to be their position, represents an impasse and that this issue is ripe for a judicial determination.

MR. HONIK: Your Honor, Ruben Honik.

May I address a couple of points?

SPECIAL MASTER VANASKIE: Yes, you may, Mr. Honik.

MR. HONIK: Your Honor, I can't tell you how strongly I disagree with the characterization of our contact.

I can state to the Court on my oath that no discussion with any of the co-leads has occurred regarding the schedule, and we have never conveyed to Mr. Ostfeld or anyone else from among the co-leads that we're unwilling to meet and confer about a schedule. On the contrary, it's as I stated, we think a schedule is appropriate.

Now, we do think that it may be premature to set it on the timeline proposed by the defendants. And we do think that whatever that timeline is should fall on the calendar at a point time after the Court has weighed in on a certification motion. We think there's ample time to do that.

If it turns out that Judge Kugler views it differently, that's fine. But at the end of the day, inasmuch as this is an important matter for Judge Kugler to consider and determine and decide, we think there's ample time for the co-leads to confer with Mr. Ostfeld and anyone else on the defense executive committee between now and our next audience with Judge Kugler to see if we can arrive at something together. And if as in many times in the past we're unable to, we'll present our respective positions, and the Judge will weigh in on it. I don't think it's much more complicated than that.

SPECIAL MASTER VANASKIE: Okay. Anything else, Mr. Ostfeld?

MR. OSTFELD: Your Honor, I would only note the co-leads were invited to each of these meet and confers, and it was my understanding that MSPRC's counsel, who attended each of the meet and confers, was in contact with the co-leads on this issue.

It sounds like Mr. Honik's position is consistent with what was conveyed to me by MSPRC's counsel, which is that they believe this matter should be deferred until class certification has been decided. It is our understanding that Judge Kugler would like to have the TPP trial proceeding expeditiously towards trial, and we feel awaiting a ruling on class certification and any appeal from that ruling is not

consistent with that objective.

I'm at the Court's pleasure in terms of whether you would like us to confer further on this issue. We feel efficiency is best served by setting these deadlines.

SPECIAL MASTER VANASKIE: I agree, Mr. Ostfeld, that it appears appropriate that deadlines should be set, but I also am of the view that this is a trial management matter that is for Judge Kugler. So I guess I'm punting on this issue. Judge Kugler will determine whether he should set deadlines now or to require you to further meet and confer.

But I do think it would be appropriate to set deadlines. It's just a question of -- it's a trial management order, and I think that should go to Judge Kugler; unless he says to me, handle it, in which case I'd be happy to. And I'd ask you to meet and confer one more time, and then we'll issue an order if you can't agree on a schedule.

All right. Let's move then to the discovery motion itself.

And I wanted to ask a question at the outset --

And Mr. Honik, will you be addressing this issue for the plaintiffs?

MR. HONIK: Your Honor, I perhaps will be addressing certain elements of it, and folks, colleagues from Rivero Mestre will be addressing others.

SPECIAL MASTER VANASKIE: All right. The first

question I have is whether there is agreement that request 2, labeled subsidiary reimbursement and rebate data, will be answered, will be provided, the information will be provided?

MR. RIVERO: Your Honor, this is Andres Rivero from Rivero Mestre. And Your Honor, there is no such agreement. And I'm glad to address it.

SPECIAL MASTER VANASKIE: Let's address it. I think what I understood from the papers -- and I definitely could be wrong -- is that you offered to provide the documents under that category as a compromise and then not have to provide the documents under Category 3, CMS bids, and Category 4, internal reporting.

Is my understanding correct?

MR. RIVERO: Judge, it's more -- it is correct. And I don't want to -- by the way, we had very good discussions with Mr. Ostfeld, and I want to respect, you know, the settlement nature of those that attach. But we absolutely were willing to make compromise in that direction.

And, Judge, I have a proposal to make in terms of the comments I'm going to make but not wholesale.

SPECIAL MASTER VANASKIE: Okay.

MR. RIVERO: I think -- I'll explain it. But yes, in other words, Judge, in the sense that we think there is some basis for some production, yes, but not wholesale.

SPECIAL MASTER VANASKIE: All right. So let me turn

to plaintiffs then.

The defense agenda letter addressed this matter, this motion. It sounded like -- sort of like, almost like a reply brief.

Do you want to respond at all to what has been said in the agenda letter?

MR. RIVERO: Judge, it would be part of my -- I'm glad to address the entire -- if you mean the merits, yes, I'm glad to address the merits, if I may.

SPECIAL MASTER VANASKIE: I wanted to ask you, do you to take that opportunity now?

MR. RIVERO: I'm glad to, Judge.

So let me -- I think, Your Honor, indeed to get right to the heart of it, there are two categories I think the Court -- the Judge has -- you have understood, Your Honor, that it's historical information, which is 1, and then projections and estimates, which is 2, and 3, including bid information and internal reporting.

SPECIAL MASTER VANASKIE: Right.

MR. RIVERO: So, Judge, first taking projections and estimates. And of course the burden is on the opposing party to show that there's -- I'm sorry, to show that there's a -- I'm sorry, to the propounding party to show that there's relevance to what they're asking for. So talking about projection and estimates, Your Honor, 2 and 3, they simply

don't make that initial showing.

What is it they actually say that 2 and 3 could do for them, Judge? This is critical to understand why they don't make the showing.

They spent something like 40 pages, including a reply sent two days ago. And this is the closest they come to explaining to you why an estimate or a projection would have anything to do with their actual loss.

They say -- and this is page 12, Judge, of their -- of their initial brief, which was an even exchange.

They say that they want to learn, quote: Actual loss relative to their -- meaning the assignors' -- expectations, which is the crux of disputed requests 3 and 4.

So Judge, it's not because I'm saying it. It's not my characterization. They're saying 3 and 4 are specifically -- the crux of what they're asking for is they want to know expectations information in relation to actual loss.

Now, Judge, that's in and of itself -- in common sense, it doesn't make sense, because what's at issue is actual loss. All the case law that either side cites is the damages category that we are seeking is actual damages, which is an -- to say our actual losses.

So what they are saying is in 3 and 4, they want to know our expectations in relation to what ends up being the

actual losses.

Now, let me very quickly take an example why this makes no sense. And I'll go further why they don't make this showing.

Judge, let's assume I make a household budget of $3,000 for car repairs.

And this happened to me, Judge. I go to Shop 1 and I spend $1,500 and they fix my bad alternator but in the process they break my air conditioner. I paid $1,500. I'm unhappy with Shop 1.

I go to Shop 2. They charge me $1,500 to fix the air conditioner.

Now, if you were to take the defendants' logic, I didn't suffer a loss because my expectation was $3,000.

Judge, my expectation has nothing whatsoever to do. Every lawyer on this call knows I'm out at least the $1,500 that they caused the damage to the air conditioner. So what I expected doesn't determine it. Damages, Judge -- and I've been doing this for 36 years, and I know there are lawyers, including Your Honor, who have been doing this longer -- are the actual amount I spent versus the actual amount perhaps I received and other things about actual historical information. That's Category 1. What I expect has nothing to do with it. And no economist will say so.

In fact, Judge, because I go back to whether they met

their burden to show that what they say is the purpose. The crux is expectations in relation to actual loss.

Your Honor, they presented experts, Stiroh and Kosty. Neither Stiroh nor Kosty says anything of the sort, because no economist worth their salt would say such a thing. They absolutely don't have it in their reports. The only thing we have is counsel saying in the future they may so opine. But we don't have it.

Now, number two, Judge, obviously our expert doesn't say that. Our expert says that our actual loss is our actual spend. And that's based on Judge Kugler's ruling in this case that the amount that the -- that the drugs are economically worthless at the point of sale by virtue of the dangerousness caused by the contamination. I'm reading from page 20 at 28 of the Judge's order.

We don't have to debate whether we're right or wrong, but my expert is saying that was actually spent, historical information is the damage.

That, by the way, we've already provided to the defendants. They've gotten our actual spend on valsartan and they've gotten our spend on the cost of replacement, which is a defense theory, Judge, which I don't take issue with it being, you know, impossible economically. We don't agree that's the way to measure it. But it's at least something that one could explain.

Number three, Judge, they cite cases, but none of the cases goes to this question at all. The case they cite, the principal case is an Ohio case called *JLJ* that says nothing more than something that I heard in law school, expectation damages equals actual damages.

So that's -- that is it. That's what the law is, Judge. The law doesn't help them.

So at the end of the day they're saying the crux of what they want is what were our expectations in relation to our actual loss. But there's nothing in logic or in their experts or in our expert or in the case law that starts to make a showing. All they do is this conclusion. We each get expectations in relation to actual loss, but they never explain how that has any bearing whatsoever.

As a gut check, Your Honor, I called my college roommate, former chair of economics at Wesleyan University, PhD from Harvard in economics, and I asked him, and he called it economic nonsense.

Judge, there is no basis to establish the first thing, which is relevance of expectations in relation to actual loss data that they already have.

Now, Judge, turning briefly to 2. And this is really the question you asked me. Historical information is a different subject. And it's not economic nonsense. I'll concede. It's not economic nonsense. There's a different

problem that we address. And both sides talk about ad nauseam, which is it's aggregated data, Your Honor.

SPECIAL MASTER VANASKIE: Let me interrupt you just for a minute here.

MR. RIVERO: Sure.

SPECIAL MASTER VANASKIE: Because I'd like to hear from plaintiffs with respect the CMS bids and the internal reporting before going back to the reimbursement and rebate data.

Who is going to speak for defendants?

MR. OSTFELD: Thank you, Your Honor. This is Greg Ostfeld. I'll be addressing that for the defendants.

SPECIAL MASTER VANASKIE: Okay, Mr. Ostfeld.

MR. OSTFELD: So, Your Honor, I think common sense is a good place to start here.

The plaintiffs' theory of injury in this case is that because a series of valsartan-containing drugs were found in some instances many years after they were reimbursed by the TPPs to contain previously unknown nitrosamines, that the TPPs have somehow been retroactively injured by that on the basis of purchases or reimbursements that they made many years prior to the discovery of this problem and the withdrawal of the product from the market.

So that is an unusual and in our view a non-logical theory of injury, that a TPP has been injured as a result of a

purchase that it already made on behalf of its beneficiaries, that it's not really disputed delivered the clinical benefit that was intended, and they're not claiming caused specific physical injury to their beneficiaries, but nonetheless, they're claiming they have suffered an economic loss as a result of that.

The basic problem that plaintiff has is every single claim that they are asserting is subjected to an actual damages or actual losses limitation, every one of their claims, either statutory or common law. And we set forth the citations on that at pages 11 and 12 of our brief.

So the challenge ahead of us is determining whether in fact these TPPs, the MAO assignors on whose behalf MSPRC is asserting claims, did in fact incur actual damages or actual losses on purchases that they made many years ago, whether their expectations were defeated with respect to those purchases. And the way that we probe that is by determining what those expectations were versus what the costs were that they actually incurred.

And with due respect to college roommates, this is not economic nonsense. This is basic economics. Our experts, Dr. Stiroh and Mr. Kosty, specifically criticize plaintiffs' expert, Dr. Conti, for failing to account for functions like government expenditures, discounts and rebates.

Mr. Kosty said that determining the costs borne by

the MAO assignors requires a significant amount of information and is highly complex.

Dr. Stiroh said you need information on the actual expenditures and the actual losses.

So what we're trying to get to here, Your Honor, is actual losses. And this kind of information we can only obtain by determining what the MAOs expected to pay versus what they actually paid. Did the withdrawal of these valsartan-containing drugs cause them to incur some economic loss or economic --

(Court reporter clarification.)

MR. OSTFELD: So Your Honor, the data that we are seeking, both the CMS bid data and the internal reports, contain lots of information on the MAO's expected versus actual drug payments, which will be useful to assess whether in fact this withdrawal caused actual damages.

For example, Your Honor, the CMS bids contain what's called the Rx bid workbook, the prescription drug bid workbook, which has seven worksheets with highly relevant information on projected and actual prescription drug spend. Worksheet 2 of that workbook, for example, has data on the utilization and cost of covered drugs by type of script and anticipated revenue.

So this isn't like the car repair analogy where you're just making a projection and then comparing actual

spend against what was projected without looking at the categories of how it was spent, you're looking at utilization as well. So you've got projections, you've got utilization, and you're able to assess from that information the complex question of whether there was a utilization that was not in line with expectations.

We believe what this will show is that the utilization during the years prior to the discovery of the nitrosamine issue was in line with expectations, or if it was not, that that was not caused by any nitrosamine-related issues.

The question we want to assess is whether as a result of the withdrawal, there were additional prescription drug costs that were incurred. Those would constitute actual losses or actual injury to the MAOs. If it could be shown that as a result of the withdrawal they incurred additional prescription drug costs that they did not expect to incur on utilization of drugs that they otherwise would not have spent for, that's information that's helpful from an actual damages and actual loss perspective.

We don't know whether or not that's going to show up even for the year of the withdrawal. For prior years we expect that these CMS bid workbooks and internal documents are going to show us utilization and spend in line with expectations, and expectation damages are the classic measure

of breach of warranty damages.

So for that reason, Your Honor, we think we have met our threshold showing of relevance.

MR. RIVERO: Your Honor, may I respond very briefly?

Judge, I don't know if you can hear me.

SPECIAL MASTER VANASKIE: Yes. I'm sorry. I muted mine.

MR. RIVERO: No problem.

SPECIAL MASTER VANASKIE: I wanted the court reporter to be able to hear.

But yes. Go ahead, please.

MR. RIVERO: Yes, Judge. And by the way, in any remark I make, I want to say that I have a lot of respect for Mr. Ostfeld and have had very positive discussions with him. So I mean no disrespect, but, Judge, he didn't answer your question.

That answer conflates historical data and actual losses all over the place with the question of what the estimates have to do with them. And there's no -- and by the way, the last part, legally, again, no offense, but if you look at the two cases they cite, there's an Ohio -- two Ohio cases. All those cases say about expectation damages is an old term is that -- to clarify, the courts say, expectation damages in a contract setting are actual damages. It's an old -- it's just a statement of something that we all

understand.

I'm not saying anything unusual. And that's why historical information is not an economic nonsense request. But respectfully, he's waved his hands a lot, but he didn't tell you why if the assignor made an estimate that they were going to spend $3,000 on -- by the way, these are aggregated -- this is aggregated. They're not talking about specific -- there's no specific projection of valsartan. But they made it -- I'm just using the 3,000 for reasons that you know from my example.

And somebody caused them -- they really would have spent $1,500 but somebody caused them a damage, to spend $3,000, that they weren't out anything. The two are unrelated, and he hasn't explained in any way in economic sense that they are.

Again, I'm sorry, not to belabor it, but all calculation of damages is what I spent versus what I got back, and then there are legal questions about whether I should have had to spend it in the first place. But there are actual spend, actual receipt numbers, which is Category 2, not projections and estimates.

Your Honor, they just -- they simply fail under our rules. The modern discovery rules, there's a proportionality test. And the first test is does it have some bearing of relevance. And this question of estimates and projections has

absolutely no bearing of relevance, and they just -- you don't get to the second question. It simply shouldn't be, Judge.

Glad to address historical information if you want me to.

MR. HONIK: Your Honor, this is Ruben Honik.

May I add a very brief bit of context for this? Because I think there's something being lost here.

SPECIAL MASTER VANASKIE: Go ahead, Mr. Honik.

MR. HONIK: Very briefly, Judge. As I listened to Mr. Ostfeld not only today but during the course of a number of meetings on this very topic, it strikes me very powerfully that this is simply a rehash of an argument that all the defendants made at this point nearly two years ago, that the insurance companies involved here and the consumers have no injury. Right? Either because their expectations were met with reality or the insurance company would have had to pay for a substitute drug for any number of other reasons, all of which were asserted in extensive briefing to Judge Kugler.

And what Mr. Ostfeld did today on the record is to mischaracterize our claim. Our claim for warranty is not based on the lookback that he's talking about. What the Judge has ruled in this case as a matter of pleading -- and we understand that we have to prove the elements of it -- is that this injury was completed at point of sale. When the drugs are handed to patients, consumers, at the point of sale, they,

as well as the insurance companies, have completed an economic transaction. They've paid for this drug.

And what the theory of this case is and what our damage experts have modeled and outlined, which we do in innumerable pharmaceutical cases, there's nothing novel about this, is to say that these drugs were illegal, should not have been in the marketplace and therefore have zero value.

And the Court in its motion to dismiss ruling embraced that, for better or worse. And Mr. Ostfeld is simply trying to reargue that.

And I mention this, because it's important to understand the theory under which this is proceeding on the relevance question.

If the injury and damage is complete at the point of sale, the only question really is what was paid and what was reimbursed. Those are the historical numbers that Mr. Rivero is referring to. And we have both provided and will supplement historical data so that they understand what the actual dollars are.

It is wholly irrelevant to understand what the parties thought they may have to put out. And it's even more attenuated, Judge, because the numbers here -- we've used the word "in the aggregate" frequently, but let's break down what that means.

That means that the expectation is for all drugs, all

medical devices, all hospital treatment. It's an all-in number. And because I was the one that deposed their experts, Stiroh and Kosty, I asked them specifically -- because they were barking up this tree at the beginning -- I said, how are you going to do it, what's the formula, what's the methodology, if you're going to take this aggregated number and tell us how much is associated with valsartan? And Judge, they were unable to do that.

And so this is relevant, because if they confessed or stated under oath that there was no method by which you could take an aggregate number reflecting a bid or an expectation or, for that matter, the actual aggregated number once paid or exchanged and then extrapolate from that something specific that is de minimis for valsartan, that should not be a basis for them to have a fishing expedition now.

That's what this is. They're fishing for numbers to conjure up a formula that their experts have already conceded under oath cannot be done.

That's the essence of the relevance argument.

MR. OSTFELD: Your Honor, this is Greg Ostfeld.

May I be heard on these issues?

SPECIAL MASTER VANASKIE: You certainly may, Mr. Ostfeld.

MR. OSTFELD: Thank you, Your Honor.

I like to begin with Mr. Honik's point regarding

Judge Kugler's ruling on the motion to dismiss.

I think it's important to understand, as Mr. Honik acknowledged, that this was a ruling that was made at the motion to dismiss stage. And as Judge Kugler put it, the TPP plaintiffs had alleged sufficient injury and the lack of functionality at the motion to dismiss stage.

All that means is that we are at issue on plaintiffs' alleged worthlessness theory. They are allowed to try to prove that theory, and we are allowed to attempt to refute it. So the fact that we intend to challenge that theory I think should not be surprising to anyone. And the idea that we would want to take discovery to demonstrate and substantiate our challenge to that theory also should not surprise anybody.

It is our intention to show not only that the products were not worthless at the point of sale but also that the TPP plaintiffs incurred no injury because they incurred no economic losses or actual injury.

At most what Mr. Honik has described might be a theory of injury on the consumer side that they did not consume what they believed they were consuming. We disagree with that theory.

But certainly on the TPP side the idea that a third-party payor whose only role was to reimburse a drug that was purchased suffered an injury where they incurred no additional cost or injury is something that we are allowed to

vigorously challenge through our experts.

I also respectfully disagree with Mr. Honik's description of the admissions he believes he got out of our experts at deposition.

The plaintiffs have now had an opportunity to brief the issue, and those quotes which Mr. Honik also described at the last case management conference certainly did not emerge in their papers. And in fact, we put in the relevant quotes into our papers. And what Mr. Kosty said was not that it was impossible to disaggregate but it requires a significant amount of information and is complex. What Dr. Stiroh said is that information is needed on the actual expenditure. So these were indications that what is needed to perform the type of exercise that Mr. Honik describes is more information.

I also respectfully -- as Mr. Rivero said, we had many good conversations, we had many good meet and confers, we didn't reach resolution. I respect him as well. I even respect his roommate whose deposition I would like to take based on the representations that have been placed on the record today.

But I think the key point, Your Honor, is you have to look at not just -- it's not just a matter of the projections. It's not just a matter of the expectations. We're not seeking that in the abstract. What these papers tell us by looking at utilization and spend, in addition to expectations, is how the

actual spend tracked the expectations. That's the key difference from his car repair analogy. We're not just getting the budget at the beginning of the year of I expect to spend $3,000 on car repair and then calling that a lack of injury. We then get to actually see how the money was utilized and how the spend lined up with the budget.

So what we would get to see in the example of his analogy is the repair that was made, the damage, the additional repair that was made, in that instance comparing the projection against the spend shows the injury. It's not just zeroing out the balance at the end. It's looking to see utilization. And that's why we think the CMS bids are relevant and why the internal documents are relevant.

SPECIAL MASTER VANASKIE: Why would it be appropriate to provide them for a -- for the past ten years, the time frame of the request?

MR. OSTFELD: Your Honor, that is a fair question. It is most important for the year of the withdrawal. We think that year is clearly relevant.

To the extent that the plaintiffs -- the TPPs are asserting that they suffered economic loss retroactively from prior spend, the projections in the previous years would be less relevant. For the years other than the year of the withdrawal, we may not need the projection data, but the actual utilization and actual spend data from the Rx

worksheets would still be relevant, because that still enables us to assess their theory of actual injury.

SPECIAL MASTER VANASKIE: And by the year of withdrawal you mean 2018?

MR. OSTFELD: For the NDMA drugs, yes, I believe that's correct, Your Honor.

I apologize. I've always been bad at dates. I'm sure somebody will pipe up if I've gotten the date wrong, but I believe it is 2018.

SPECIAL MASTER VANASKIE: Okay. Go ahead.

Is that Mr. Honik or --

MR. RIVERO: No. It's Andres Rivero, Judge.

SPECIAL MASTER VANASKIE: Mr. Rivero.

MR. RIVERO: Your Honor, yeah, I didn't get to address the historical information, and I don't know --

SPECIAL MASTER VANASKIE: I do want to get back to that. I want to finish up on this.

MR. RIVERO: Okay. Yep.

SPECIAL MASTER VANASKIE: The other point that's been raised -- I shouldn't say the other. But another point that has been raised concerns the proprietary and confidential nature of this information.

MR. RIVERO: Yes, Judge.

SPECIAL MASTER VANASKIE: It seems to me that can all be covered by the existing protective orders.

Why wouldn't be the protective orders be sufficient?

MR. RIVERO: Your Honor, that's on the second prong of this analysis as to both categories.

But again, there is simply no showing -- I don't know what Mr. Ostfeld is saying when he says utilization. There's absolutely no showing that a projection -- and I understand what he's saying is that a report may have both historical information and a projection. But we're saying as to the historical information, let's have that discussion about what that means. But the part of it that's an estimate has no bearing on what you actually spent.

If the Court on any aspect of this were to find that production should be made -- Judge, I understand what the Court is saying. It's extraordinarily sensitive. In the SummaCare situation we have the testimony of the affiant from SummaCare who says they're in the most competitive jurisdiction in the United States for these bids and that, in fact, Judge, one of the defendants that we can identify, we don't know how many, are direct competitors. So we would want this applied in the most rigorous way.

But I understand what the Court is saying. If you were to order any kind of production, there is an order. We'd want -- we would want to discuss what the right protections were, especially in relation to competitors; but just they simply don't meet the first prong on projections and

estimates.

I'm glad to answer any questions on that or address historical information.

SPECIAL MASTER VANASKIE: No. That's all the questions I had thus far.

Let's go to the historical information.

MR. RIVERO: Your Honor, obviously I make a distinction whereas they make no showing whatsoever that an estimate could bear on the actual spend and what's actually received back by the assignors. I understand that doesn't apply. And I'm not making that argument on historical information. It could apply.

Here's the problem that exists for their making the showing, though, that what we have is relevant to their claim. All -- and this again is in our affiant's declarations. And this is simply a fact. We produced already the particularized historical information on total valsartan spend, and we produced historical information on what we spent on replacements. That we already gave to the defendants. They have that. So on the spend side as to this drug that's in controversy, they have it.

What they now want on the spend side is they want -- what we have is the aggregate of all pharmaceutical spends.

Now, Judge, number one, again, I don't know why that's relevant. We totally -- what we spent in total, I

don't know how it goes to our damage on this. But I can at least see the possibility, perhaps in relation to the next part of what they ask, which is what did we receive from Medicare. And I'm not saying it's economic nonsense. That would be -- that would be -- that would be wrong. There's a way it could be.

The problem is, Judge, they don't make -- they don't make any showing that they have anyone who would be able to create an economic model to disaggregate -- I think they call it tease out. I think they use that -- somebody uses that. It might be -- I don't know if it's counsel or one of their experts. To tease out in the aggregate what the assignors got from Medicare and how it did or did not relate to valsartan. For the aggregate information to be relevant, they have to have a means to disaggregate.

Rena Conti, our expert, says that cannot be done. Now, I understand that one of their experts say it can be done. I get that. But they haven't presented somebody who says that.

But more important, Judge, there is one case exactly that they cite on the entire subject matter, and that's in *Namenda* out of New York. And I think nobody has really looked at what *Namenda* means.

*Namenda*, Your Honor, was a motion in limine by the defense to strike the plaintiffs' expert who testifies on

actual loss. And that plaintiffs' expert says that there are Medicare payments but that it is not possible to disaggregate the Medicare payments, exactly what I'm telling the Court. That's what the court reports in its decision in *Namenda*, if you look at it.

The defense expert, a fellow named Grabowski, says the plaintiffs' expert is wrong. There may be a way to tease it out, and therefore, the expert opinion is -- the plaintiffs' expert opinion is misguided and should be excluded.

But Grabowski, the opinion doesn't say -- because Grabowski doesn't do it. Grabowski doesn't give a model about how you would be able to do it. He just says, it may be possible to do it.

Here's the ultimate point, Judge, to get to the common sense and practical concerns. I understand it's possible. Grabowski says it's possible. Defense counsel say it's possible. They haven't offered an actual example or model that we could look at and say, okay, yeah, we understand and we can negotiate into that.

Here is what I would suggest very specifically, Judge, is -- and I would certainly -- this would be a -- the nature of a compromise is there are different categories. There's the regular Part D per capita, per head reimbursement. I'm glad to talk with the Court about why that's not

disaggregated and why it can't be disaggregated, which is a reimbursement per person for pharmaceuticals.

But Judge, I think they -- honestly, I believe they'll never -- no expert is going to really be able to do that. Or Conti says they can't do it. Judge, given them the year of recall. Give them the year of recall. And if they can come up -- if an expert can come back and use the year of recall and put together a model and persuade you they can do it, let them come back and say, we're entitled to more.

But, Judge, on -- I think to be fair, on both catastrophic and low income, those are two categories, give them two years, Judge, for the same purpose, because I believe, and in fact the plaintiffs' expert in *Namenda* says it. So it's not because I tell you; it's because -- he says, there -- he says, well, there could be some possibility on catastrophic, which is a kind of Medicare payment to these assignors, and in the low income -- by the way, the plaintiffs' expert in *Namenda* doesn't mention low income, but I'm telling the Court and the defense we believe that somebody might say and it might be the area where they could find something and make some model. So I'm being as -- you know, I'm trying to be as fair on this as possible.

Give them two years, Judge. If they can come back -- because Rena Conti says, and I think she is the leading pharma medical economist in the country, that it can't be

disaggregated or teased out, there's no reason they should get ten years. It doesn't make sense. But I think that that would be a fair result on this, Judge.

So to just -- and part of it -- the reason I say one to two years, it is extraordinarily sensitive. This is the heart of our assignors' business. In the MAO business, the entire thing is the bids. And it's the secret sauce of, you know, their estimates about medical inflation, their estimates about how much, you know, the change -- the actuarial change and the age of their pool population. And they're all competing on these extremely specific things. It's the sources and methods.

So that's why I would say, Judge, it would be in my view a fair way to split the baby to say, okay, take these samples, test them, and if you can come back with something and show the Court -- you know, obviously we're going to look at it very carefully, Judge. So that's what I would suggest to the Court.

But again, the real legal analysis, Your Honor -- I'm sorry, I don't want to belabor it -- is they don't meet the burden right now. They do not meet the burden that they have a means to disaggregate that would actually make it work. So frankly, in a technical -- technically, I think they're not entitled to it.

But I did tell the Court that I had a non-wholesale

approach to this that I think is fair, that gives them a chance to do what they're saying, which the expert, Grabowski, for the defense in *Namenda* said was possible but didn't do. And then we could know whether they're actually able to do it. That would be --

Your Honor, may I have just one moment?

SPECIAL MASTER VANASKIE: Yes, you may.

MR. RIVERO: And not -- and Judge, I do not want to abuse your time, but while I recognize --

I think somebody is speaking. I want to make sure the court reporter can hear.

Judge, it's not economic nonsense to talk about historical info. There is simply no logical defense for projections and estimates in any way when we are talking about what was actually spent, which we've already given them, the actual spend on replacement costs, which we've already given them for valsartan, and what I'm telling the Court where -- you know, we are prepared to accept an order to prepare -- to present actual receipts in aggregate, that's all we have, on recall year as to generalized Part D premiums and maybe two years as to -- as to -- as to allow them to test a real economic theory. It's economic nonsense to talk about what was estimated beforehand as having anything to do with what was actually paid or was actually received.

Thank you, Judge.

SPECIAL MASTER VANASKIE: Thank you.

MR. OSTFELD: Your Honor, this is Greg Ostfeld.

SPECIAL MASTER VANASKIE: Yes, Mr. Ostfeld.

MR. OSTFELD: I think there have been two rather remarkable propositions that have just been put forward by MSPRC's counsel.

One is a reversal of the burden of proof, the suggestion that it is somehow defendants' obligation to disprove damages rather than plaintiffs' burden to prove damages.

And the second is that demonstrating how data would be used at trial precedes the discoverability of that data at the discovery stage.

And I respectfully disagree with both of those.

The starting point of this analysis is plaintiffs' burden to prove damages and the limitation on every single one of MSPRC's claims that they are limited to actual damages or actual losses.

There are -- there's a very important implication to that. Government payments, subsidies, reimbursements and rebates are not actual damages. They must be subtracted from damages or set off. As the *In re: Namenda* court found, it is not even a close question. And it is our position that it is plaintiffs' burden to disaggregate the data and to subtract or set off the government payments. And to the extent that they

fail to do so, they are subject to criticism for failing to do so.

And that is what is -- exactly what is at issue in *In re: Namenda*, and I think Mr. Rivero's description of that case demonstrates exactly why these data are relevant.

What we may very well end up with at the trial stage are an expert from plaintiff who has not accounted at all for government expenditures in their calculation of MSPRC's damages and an expert for the defense who is criticizing plaintiffs' expert for failing to account for, subtract and set off damages and seeks to use the discovery materials to demonstrate that those data existed and plaintiffs simply failed to do it.

We don't necessarily have to undertake the exercise that plaintiffs apparently plan not to undertake. We don't have to go year by year, calculate the government expenditures and subtract them. We just simply need to demonstrate that there is a basis to criticize plaintiffs' expert to do that.

Now, we also may go through that year-by-year exercise, but we certainly don't have to demonstrate how we're going to do that, give them a preview of who our expert is and what our expert's opinions are going to be at the liberal discovery stage.

I think what we have demonstrated is these data are relevant. The opportunity to look at government expenditures,

the opportunity to determine whether those can be disaggregated, whether those can be subtracted from plaintiffs' asserted damages calculation, is clearly relevant, is directly relevant to what is at issue in this case. And I haven't heard anything from plaintiffs to suggest that we haven't met our burden on that or that *In re: Namenda* is wrong in its demonstration that government payments should be subtracted from actual damages.

So this simply becomes an issue of a complex calculation, which is what our experts said, a calculation that requires a lot of information and something that needs to be evaluated closely by the damages experts for both sides in order to determine how to subtract, how to set off this very important, potentially -- as our expert, Mr. Kosty, said, it's about -- it's -- approximately 75 percent of the total spend on prescription drugs comes from the government. So we're talking about a very important component of damages here.

And this is the classic reason why you take discovery, why you have broad and liberal discovery at the discovery phases, to enable the experts, the people who know this space, the people who understand these data, to dig in, to look at the aggregate data, to propose how it could be disaggregated, and who criticize each other. This is what the trier of fact is ultimately going to be asked to look at is each expert's criticisms of the others and who wins. And

having the data is an important first step for our experts to undertake that analysis.

SPECIAL MASTER VANASKIE: Why --

MR. RIVERO: Your Honor --

SPECIAL MASTER VANASKIE: Let me ask this question, please. And I'll ask this of Mr. Ostfeld.

Why wouldn't it be satisfactory at this time to limit the production of the subsidy, reimbursement and rebate data to the year of withdrawal or a two-year period and have your experts determine what they can do with that information and make your case for requiring more?

MR. OSTFELD: Well, Your Honor, I have two points that I would make on that.

The first is that they're not seeking damages just for a two-year lookback period, that they are seeking damages going back for -- I believe six, seven, eight, ten years, whatever the relevant time period is. They are seeking damages going back quite far in time. And it is inefficient for our experts to evaluate data on a piecemeal basis.

The second point, Your Honor, is, I don't believe we've heard any explanation from the plaintiffs as to why it would be unduly burdensome for them to produce these data for the relevant years. We've listed on pages 7 and 8 of our brief the specific reports and the specific datasets that we believe are responsive to request number 2.

These are pre-baked. These are things that exist in a finished form. They're all accessible from the same databases. They're all accessible from the same websites. You know, it's not like retrieving -- retrieving eight years or seven years or six years is significantly more burdensome than retrieving one year or two years. Plaintiffs have certainly made no showing on that basis.

So rather than have some form of iterative process where we're going back and forth between discovery and demonstration and discovery and demonstration and having to preview our experts' opinions, which I also think is prejudicial and unfair to the defense when plaintiffs are not previewing their experts' opinions and where they're opposing having a case management schedule as to damages experts, I don't think they should get a peek at what our experts' methodology is going to be.

They haven't demonstrated burden. They haven't demonstrated that this is irrelevant. Produce the data. Let our experts undertake their analysis. They'll see the results at the same time that we do, at the same time the Court does, and then we proceed the way we always proceed in a trial, to have the trier of fact decide who's right.

MR. RIVERO: Judge, if I may, Andres Rivero.

Judge, I think -- I want to make sure it's really clear what I'm saying.

We're at the discovery phase. They have to show the relevance. The problem that they have right now, and unfortunately nobody can do this, they need to show you now that the aggregated data now would be relevant. All they're saying is maybe. And in fact, I got to tell you, it's worse. Because Mr. Ostfeld says -- says, you know, maybe I can do it. But the problem he has is that his expert, Mr. Kosty, testified -- I have it in my brief at page 4 in a footnote: The payments provided from the federal government to plan sponsors -- that's the assignments -- are independent of spending on a specific drug. Judge, that's a quote.

Mr. Kosty also says -- that's on the Part D, Judge. That's the premium, which I'm telling you should be limited to a year. And honestly, they don't meet their burden, they shouldn't get the year, Judge, technically based on the law and based on what Mr. -- their own experts said.

On what's called the Medicare risk corridor, which is the catastrophic, which I referred to, which I said to be fair, because we think it's a little bit more possible on a risk -- on the risk corridor/catastrophic or on the low income that somebody might be able to do something.

Kosty doesn't think so. Their expert doesn't think so. Let me quote him. Quote: Medicare risk corridor payments are made in aggregate at the end of the benefit period and are not directly attributable to specific products,

classes of products or individual claims.

Judge, that's not our expert. That's their expert.

The problem they have -- and I'll go back to *Namenda* for a second because I don't know if he's crystal clear. They have a very serious problem. Right now in discovery we're telling them and their expert is saying, the receipts for Medicare are aggregated. They are not traceable back to valsartan. That's what Kosty says. I just read it to you. How in the world can aggregate be relevant?

And here's what the proposal is, which I'm agreeing is not economic nonsense. It could be possible. It's conceivable. Some expert might come in and create a model. But the problem is they don't show us anything. Their experts don't talk about it. So it's a guess. It's a speculation. They haven't shown that it would be -- that it can be done.

And the expert that the defense put forward in *Namenda*, a Dr. Grabowski, but -- and I noticed that the defense doesn't want to do any specifics. They don't want to talk specifically about their cases. They don't want to talk specifically about their experts. They don't want to talk specifically about anything that's been produced to them. They want to talk in generalities.

Grabowski in *Namenda*, the order appears to suggest Grabowski got no discovery. All Grabowski does is criticize the plaintiff. So discovery from the best I can tell in

*Namenda* was not permitted for exactly what they're asking here.

So Judge, it's a speculation. They don't meet the burden.

But I think I'm being very reasonable in proposing let me them have a year and see if they can do what nobody has yet done. So I feel like it's Star Trek, to go where no one has gone before. Maybe they're going to be able to do it. And then give them the two years on the other categories, because, again, I'm being ultra fair. We do believe there might be some more possibility there. Let them try.

If they meet their burden in the first place, it doesn't solve my proportionality problem. My proportionality problem, my -- the sensitivity, but I conceded to the Court that there is a confidentiality in place.

This is the entire competitive advantage of each of these MAOs. Judge, if this leaks in here, it does really serious economic harm. And I'm -- frankly, I propose attorneys' eyes only with their experts, because this is super sensitive, but I do say since it's not economic nonsense, let them have a sample to see if they can meet the relevance burden.

It is their burden. I'm not burden shifting. They're failing to meet their burden, and I'm making a concession I don't think I have to, Judge. That's my

proposal.

MR. HONIK: Your Honor, Ruben Honik. There's another very compelling reason not to grant this discovery, Judge, and that's internal consistency.

The relevant case to look at is not *Namenda*. And I'll tell you why in a moment for another reason. It's our case.

Plaintiffs sought in this very litigation the production of cost data from downstream defendants, wholesalers and retailers within the first year of this litigation. It was extensively briefed and argued to Judge Schneider. The downstream defendants said that it's aggregated data that you cannot segregate. They argued that it is highly sensitive to their business modeling. And we were denied an opportunity to get that aggregated data.

There is precedent in this case where this Court has denied a requesting party the very kind of data that we're talking about here. And to now, frankly, consider any positive by producing this or at least producing it without some real showing that experts can do anything with this disaggregate -- or with this aggregate data I think would be inconsistent, respectfully, with the prior ruling of this Court.

And finally, let me just point out something that's extremely important that we haven't talked about. The *Namenda*

case in New York that the defendants so strongly rely upon was an antitrust case.

Why is that important to consider? That was a pay for delivery generic case, meaning an antitrust violation for the unlawful delay of a generic drug into the marketplace.

So what do economists have to do in that case to arrive at damages? Well, they have to compare a but for world where they're envisioning what the economic impact of generic entry would have been had it occurred at an earlier point in time.

In order to get at that, *Namenda* only stands for the proposition that you have to look at a very different landscape of what the economic factors were. In other words, it's a temporal evaluation economically over a period of time.

That's not what this warranty case is. This warranty case -- and no experts disagree. The defendants don't disagree. Our experts don't disagree. This is a single event, if you will, when the drug is sold and it's paid for. This isn't a comparison temporally over time in a created but for world.

The fact that *Namenda* was decided in the context of a antitrust case is -- makes it wholly different. And for no other reason than that Judge Schneider denied the very type of discovery that defendants now seek from us, that at least as confidential and proprietary to the insurers as they are to

the downstream defendants, I don't think the outcome should be any different, Judge.

MR. OSTFELD: Your Honor, this is Greg Ostfeld. I don't want to exhaust the Court's patience, but I've had two counsel make opposing arguments, if I could just briefly be heard.

SPECIAL MASTER VANASKIE: You certainly may.

And I want to ask you too, what about taking what I would view as -- not a sampling of data but limited data and then coming back if you can make the case for more of the data.

Go ahead, you respond, because you're right, you had two lawyers making arguments, and you've got -- certainly have to have an opportunity to respond.

MR. OSTFELD: Thank you, Judge.

And we're seeking limited data. We're seeking 14 specific data reports and 14 specific datasets over a limited period of time. And frankly, producing that over the full period of time versus producing it over a year or two, you're talking about essentially the same amount of effort. So it is a limited amount of data, but it will enable our experts to undertake a comprehensive analysis.

Now Mr. Rivero made a point about what Mr. Kosty said at deposition regarding the fact that the data are reported for Medicare in the aggregate. That is certainly true, but

Mr. Kosty never said that it was possible to disaggregate the data. What he said in his report at paragraphs 83 and 85 is that it requires a significant amount of information on the subsidies paid by the government entities and it's highly complex. That is why we need more data, not less.

I also respectfully continue to disagree with Mr. Rivero that the burden is upon us to demonstrate to plaintiffs how they are supposed to go about disaggregating the data, subtracting the government expenditures or setting off the government expenditures.

The law is clear government expenditures are not injury. The burden is upon the plaintiffs to perform that. It is sufficient for our experts to have the data they need to criticize plaintiffs' experts. And that is exactly the dynamic that came out in *Namenda*.

Also, I have to specifically respectfully disagree with Mr. Rivero that the conclusion to be drawn from the motion in limine ruling in *Namenda* is the discovery was disallowed. There's nothing to suggest that Dr. Grabowski in *Namenda* didn't have access to data and wasn't using the data available to criticize the damages methodology. There's simply nothing in the record to suggest that.

So what we're dealing with here, Your Honor, is a forthcoming classic battle of the experts, where plaintiffs' experts are going to be arguing that they cannot disaggregate

the government data and are going to be seeking the full amount that was spent at the point of sale as their damages.

Our experts are going to be criticizing plaintiffs' experts for failing to disaggregate the data, not over a one- or two-year period but over the entire time period. Whether or not our experts then make the next step and actually calculate what should have been subtracted out, that's our strategic decision to make. That's our tactical decision to make. We should be allowed to make that decision in conference with our experts, not get a discrete piece of data and then have to make some kind of showing beyond our burden of proof, which is not ours, it's plaintiffs' burden of proof. We should not be required to do that. We should simply be given the datasets and data to which we are entitled to enable our experts to formulate their criticism of plaintiffs' damages calculation.

Lastly, Your Honor, with respect to Mr. Honik's point regarding *Namenda* being an antitrust case. It certainly is an antitrust case, and that comes with some differences.

But on this issue, it is perfectly clear what happened. The uniform antitrust statute at issue in *Namenda* contains a statutory restriction to actual damages. We showed on pages 11 and 12 of our brief that every claim presented by MSPRC likewise has an actual damages restriction. The New York consumer protection statutory claims in fact have

language that very closely parallels the statutory language in *Namenda*.

So in all instances we are dealing with an actual damages to actual damages comparator. And the important point from the *Namenda* decision is that government expenditures, reimbursements, et cetera, are not damages. They have to come out. It's not even a close question.

If it's not even a close question for trial, it's even less of a close question at the discovery stage.

MR. HONIK: Judge, you may be muted.

SPECIAL MASTER VANASKIE: Last question I think for Mr. Ostfeld.

And that is, production of data on attorneys' eyes only basis, what's your position?

MR. OSTFELD: Your Honor, I think that's captured by the restricted confidential category in the existing protective order.

If plaintiffs are making the argument that restricted confidential is no longer sufficient protection -- and I would note the defendants have produced some really, really sensitive documents under the restricted confidential category. If they think they need something even more for this to protect their secret sauce, I certainly would be fine entertaining that, as long as counsel get to look at it and our experts get to look at it in accordance with the

restricted confidential category.

If there's some category of disclosure within that section that goes beyond that that they want to talk about, that's fine. We don't want -- we're not looking to expose their secret sauce to the world. We're looking to show it to our experts and to be able to confer amongst counsel on it.

And that's for the TPP defendants. We're not suggesting that CVS or the other downstream defendants or pharmacies need to be brought into this.

SPECIAL MASTER VANASKIE: All right. Thank you.

Anything else from the plaintiffs?

MR. RIVERO: No, Judge, not from me.

SPECIAL MASTER VANASKIE: All right. Well argued. We'll try to get a decision out promptly on this. I'm sure I'll get the transcript -- this argument has been very helpful. I'm sure I'll get the transcript promptly and make a decision.

Is there any other matter you need to cover with me before we get Judge Kugler on the line?

(No response.)

SPECIAL MASTER VANASKIE: Hearing nothing, what I'm going to do then is drop off the call.

Excuse me? Go ahead.

MR. HUNCHUCK: I was on mute myself, Your Honor.

This is Steven Hunchuck from Morgan Lewis & Bockius

on behalf of defendants.

I just -- if I may, just give a quick update on the losartan/irbesartan plaintiff fact sheet.

SPECIAL MASTER VANASKIE: Okay. Thank you.

MR. HUNCHUCK: I'll be short, Your Honor, because this really is just a status update for the Court.

But in light of the recent productions of core discovery from both parties in part, the defendants have reached out to plaintiffs and discussed proposed plaintiff fact sheets related to those products. We sent them drafts on -- to plaintiffs' counsel on Friday.

So while this issue isn't ripe for today, other than to inform the Court that the parties have begun the conferral process and defendants hope to present any disagreements at the next biweekly conference call.

SPECIAL MASTER VANASKIE: Great. Anything else?

MS. LOCKARD: Judge Vanaskie, good morning, it's Victoria Lockard.

SPECIAL MASTER VANASKIE: Yes.

MS. LOCKARD: Just briefly, the only other issue I believe we had proposed that is appropriate for you is the parties had jointly proposed a briefing schedule on the motion to seal, which we included in our submission, for opening briefs on December 2nd and response briefs on December 19th.

So we'd like to get the Court's endorsement of that,

if you're inclined, and proceed accordingly, or as otherwise instructed.

SPECIAL MASTER VANASKIE: Ms. Lockard, I thought you were interrupting to congratulate the Phillies on beating the Braves during the playoffs, but --

MS. LOCKARD: Ooh. I didn't expect it from you, Judge Vanaskie. I expected it from Judge Kugler, but okay. We'll take --

SPECIAL MASTER VANASKIE: We're both Phillies fans.

Yeah. But we'll issue an order on that.

I just want to double check with Judge Kugler, because, again, it was one of those motions, it wasn't clear if that should be mine or I should let Judge Kugler handle it. But I don't see that as a problem.

Anything else?

(No response.)

SPECIAL MASTER VANASKIE: All right. I'm going to drop off the call, get Judge Kugler on the line and rejoin you all.

Thank you all very much.

(Pause in proceedings.)

THE COURT: It's a great day to be a fan of the Philadelphia Phillies and the Eagles.

Hey, Mr. Slater, I was really disappointed in your Yankees. I don't know what happened, but I think their team

is better than that. But what are you going to do?

MR. SLATER: Judge, as a Yankee fan, I thought they exceeded expectations.

THE COURT: No.

MR. SLATER: Don't you like a Yankee fan with a glass half full attitude, though?

THE COURT: Well, they have some decisions to make now, that's for sure. We'll see how they do.

But anyway --

MR. SLATER: But congratulations to the Phillies.

THE COURT: Huh?

MR. SLATER: I said, congratulations to the Phillies.

THE COURT: Thank you. They exceeded all my expectations. Back in September, I didn't think they were going to make it to the playoffs, bit boy, it sure has been exciting to be a Phillies fan right now. Houston is a great team, but, you know, hope springs eternal among Philadelphia people, so we will see.

How about we get right to the dismissals.

Mr. Harkins, are you going to handle this?

MR. HARKINS: Yes, Your Honor. This is Steve Harkins with Greenberg Traurig for the Teva defendants and Joint Defense Group.

THE COURT: You wrote about Richard Allen Williams.

Is Mr. Pittman on the call for Mr. Williams?

MR. HARKINS: Your Honor, this is Mr. Harkins. I'm not hearing anything from counsel for plaintiffs or the Court. But I just want to confirm that I'm not missing somebody on mute.

THE COURT: Mr. Harkins, this is Judge Kugler again. I got disconnected. I guess I haven't paid my AT&T bill lately, so --

Anyway, I started to ask if Mr. Pittman was on the line for the plaintiff. Is he on the line?

Is anybody on the line for the plaintiff Richard Allen Williams?

I don't know, Mr. Harkins. Have you heard back from them since you got the letter?

MR. HARKINS: Your Honor, we have not. Other than that submission, we have not seen anything from counsel. They have not attended any of the meet and confers.

I also note that effectively the extension that was requested has really been granted by plaintiffs' counsel.

I can confirm that as of right now there is still no plaintiff fact sheet filed with regard to this case, so we think it's appropriate to finalize dismissal at this time.

THE COURT: All right. I'm going to grant your motion to dismiss. This has been going on for quite some time, and I don't know what's going on, but the plaintiff needs to make a decision, hasn't made a decision knowing what

the consequences were, so I'm going to grant the application to dismiss that.

All right. You wrote that the King and Collins matters have been resolved.

How about the other four?

MR. HARKINS: One update there, Your Honor.

The Elie Greene v. Aurobindo matter has also been resolved, and that order to show cause can be withdrawn.

The defendants therefore are only requesting dismissals in three matters, the Smith, Thompson and Bernhardt cases, and defendants would move for dismissal of those three actions at this time.

THE COURT: Okay. Benita King, Carrie Collins and Elie Greene, that order to show cause will be dismissed.

Anybody want to speak on Jim Smith, Eric Thompson or Estate of Bernhardt?

MR. RESNICK: Your Honor, good morning. This is Steven Resnick from Parafinczuk Wolf on behalf of the Estate of Charles Bernhardt. I'd like to address the issue if I may, Judge.

THE COURT: Sure.

MR. RESNICK: So our firm was retained by Mr. Bernhardt in 2019. He subsequently passed away in 2021.

The surviving spouse, Osha Bernhardt, she's in her 80s, and we've had some difficulty contacting her. We've made

a number of calls. We've sent several letters. We tried to locate other family members without much success in terms of a response.

We recently engaged a company called Peoplehunter.com which specializes in locating individuals for attorneys. And that outfit helped us locate one of the children, a daughter name Vicki Brown.

As it turns out, Judge, Mrs. Bernhardt happened to be staying with the daughter at the time. And we're now in touch with Mrs. Bernhardt, and we have her cooperation.

She certainly understands her obligations. She's completed a fact sheet which we literally received yesterday and which we submitted yesterday. There may be a missing authorization which we've resent to the plaintiff. But we're now in communication with her, and we have a good method of reaching her.

Given her age, she does need a bit more hand-holding, but I think it would reasonable to allow her at least one more opportunity to participate in this litigation.

So we would request an order to show cause be denied or at a minimum that the returnable date on the rule to show cause be extended at least to the next case management conference.

THE COURT: All right. We'll extend it another 30 days to the next management conference to see how it works

out. Okay?

MR. RESNICK: Okay. Thank you, Your Honor.

THE COURT: All right. So the Jim Smith and Eric Thompson matters will be dismissed since no one has spoken on their behalf.

Mr. Harkins, you have -- let's see -- ten you want to list for order to show cause.

Any changes on those?

MR. HARKINS: One update there, Your Honor.

Number 4 on our list, Gracie Ellis, that case can be withdrawn, so we would request orders to show cause returnable at the next case management conference in the other nine matters.

THE COURT: Anybody want to speak on behalf of any of these plaintiffs at this time?

MR. NIGH: Your Honor, it's Daniel Nigh on behalf of Carl Mirabile. And I would just reiterate what we said in the past, that we don't believe that billing records are a core deficiency. However, as we've done in the past, we've been able to usually work these out over the next 30 days so we don't have an issue at the next case management conference.

THE COURT: Okay. You've got another 30 days to see if we can get it worked out.

Anybody else?

MR. RESNICK: Your Honor, this is Steven Resnick

again from Parafinczuk Wolf. I can speak to Chikhi, Baker and Engel.

We're still working to cure the deficiencies in those cases and hope to be able to do so by the next case management conference. Just wanted to let you know.

THE COURT: Okay. Thank you.

All right. Estate of Rita Chikhi, C-H-I-K-H-I; Yvonne Baker; Carl Mirabile, M-I-R-A-B-I-L-E; Gracie Ellis; Rose McCarty; Bobby Yount.

I'm sorry, Gracie Ellis, no. That's not going to be listed.

Rose McCarty; Bobby Yount; Robert Parker; Howard Engel; Genita, G-E-N-I-T-A, Johnson; and Anthony Long will all be listed as an order to show cause why they shouldn't be dismissed at the next management conference.

Then we have 20 more, Mr. Harkins, you want to list again. Correct?

MR. HARKINS: Yes, Your Honor. No updates on the remainder of that list, although turning just back briefly to the prior request orders to show cause in the nine cases, I'll just note, because this comment has been made several times now on our recent most case management conference calls, the specific issue of whether medical expenses were a core deficiency was argued to Judge Schneider on the May 27, 2020 case management conference.

Judge Schneider ruled that the failure to provide medical expenses or records documenting medical expenses was a core deficiency, that being a deficiency that standing alone was sufficient to justify placement on this list and a request for an order to show cause leading to eventual dismissal.

We've been proceeding under that for more than two years now, so we are going to continue to list these as a core deficiency in accordance with Judge Schneider's ruling. If the Court would like us to revisit that, we certainly can.

And again, I believe as Mr. Nigh has acknowledged, this has not led to the actual dismissal of cases, but it has been very helpful in enabling us to actually obtain these records from plaintiffs.

So with that note, though, no other updates to the requests for defendants to relist those 20 matters for the next case management conference.

THE COURT: We are not going to revisit that ruling. It has been efficient. Everybody understands it.

But I understand how Mr. Nigh makes the point he makes, and that's okay. But we will continue to dismiss cases if they fail to supply billing records.

All right. So we have Clifford Conley; Harold Mabry -- I'm having some problems here today with the internet -- Dennis Macabuhay, M-A-C-A-B-U-H-A-Y; Estate of Daniel Kwoka, K-W-O-K-A; Estate of Eloise Allen; Carrie

Collins; Maritza Hernandez; Zola Owens; Willie Quarles, Q-U-A-R-L-E-S; Larry Bass; Ina Roddey, R-O-D-D-E-Y; Estate of Candace King; Robert Bailey; Thomas Amoia, A-M-O-I-A; Robert Lewis; Brian Thompson; Renne, R-E-N-N-E, Bishop; Mona Clark; Estate of Charlotte Orrino, O-R-R-I-N-O; and Estate of Gale, G-A-L-E, Barber will all be listed next time for a second listing.

Mr. Harkins, does that cover everything?

MR. HARKINS: That does. Thank you, Your Honor.

THE COURT: All right. I understand that you're still trying to work out this timing for the motion to seal, but apparently you've made a proposal. And if that's agreeable to both sides, we'll enter that order.

The damages expert, I'm a little unclear as to where you are in the timelines for that. I think there ought to be timelines for the damages experts as requested by defendants. If you can't work out the dates, I'll just impose them on you.

So do you want to -- plaintiffs and defendants want to try to talk to each other about the dates for that and then submit an order or proposal?

MR. HONIK: Yes, Your Honor. Ruben Honik for plaintiffs.

We would like that opportunity.

THE COURT: Okay. Let's get that done within the next seven days, please.

MR. HONIK: Yes, sir.

THE COURT: All right. Anything else?

(No response.)

THE COURT: Hearing nothing, thank you very much. And Happy Halloween, everybody. We'll see you next month.

RESPONSE: Thank you, Your Honor.

(Proceedings concluded at 11:25 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

*/S/ Ann Marie Mitchell, CCR, CRR, RDR, RMR*
*Court Reporter/Transcriber*

*30th day of October, 2022*
*Date*

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